Supreme Court, U.S.
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No. 02-165

IN THE

Supreme Court of the United States

RICHARD A. BORGNER and
THE AMERICAN ACADEMY OF IMPLANT DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY
and JOHN O. AGWUNOBI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE FLORIDA BOARD OF DENTISTRY

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(850) 681-0207

ELLIOT B. KULA
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent
The Florida Board of Dentistry

i76839

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Section 466.0282, Florida Statutes (1999), allows Florida-licensed dentists to advertise credentials from organizations and specialty practices not approved by either the American Dental Association or the Florida Board of Dentistry, subject to a modest disclaimer to that effect. The earlier version of this statute prohibited such advertising altogether, but was found to be an unconstitutional infringement on commercial speech. The Florida Legislature was then prompted to enact the 1999 amendments, which amendments were intended to comply with this Court's repeatedly stated preference for disclaimers rather than outright prohibitions on speech when regulating potentially misleading advertising. *E.g.*, *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977).

The question presented is:

Whether the disclosure provision of Section 466.0282, Florida Statutes (1999), requiring Florida-licensed dentists to include a disclaimer when advertising professional credentials from dental organizations and specialty practices not recognized by the American Dental Association or The Florida Board of Dentistry, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	4
I. The Standard Governing Disclaimers Is Well-Established.	4
II. Petitioners Present No Case For Review.	10
Conclusion	18

TABLE OF CITED AUTHORITIES

Cases:	Page
Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992)	3, 13, 14
Bates v. State Bar of Ariz., 433 U.S. 350 (1977)	i, 4
Bingham v. Hamilton, 100 F. Supp. 2d 1233 (E.D. Cal. 2000)	3
Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989)	5
Borgner v. Cook, 33 F. Supp. 2d 1327 (N.D. Fla. 1998)	1, 16
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)	*passim*
Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995)	5, 9, 10, 13, 15
Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136 (1994)	3, 6, 9, 10
Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000)	12, 13
Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990)	i, 3, 6, 8, 9

Cited Authorities

	Page
In re R.M.J., 455 U.S. 191 (1982)	6, 7
State ex rel. Greenberg v. State Bd. of Dentistry, 297 So. 2d 628 (Fla. 1st DCA), *cert dismissed*, 300 So. 2d 900 (Fla. 1974)	14-15
Strang v. Satz, 884 F. Supp. 504 (S.D. Fla. 1995)	15
Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918)	15
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	4
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)	*passim*
United States Constitution:	
First Amendment	i, 4, 6, 12
Fourteenth Amendment	i
Statutes:	
§ 466.004, Fla. Stat. (2001)	1, 14
§ 466.0282, Fla. Stat. (1999)	i, 1, 2, 4
§ 466.0282, Fla. Stat. (2001)	15
§ 466.0282(3), Fla. Stat. (1999)	1
§ 446.0282(4), Fla. Stat. (1999)	1

Respondent, the Florida Board of Dentistry, respectfully requests this Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Richard A. Borgner ("Borgner") is a Florida-licensed dentist who practices general dentistry, and advertises himself as a member of the American Academy of Implant Dentistry ("the AAID"), a "Fellow" of the AAID and a "Diplomate" of the American Board of Oral Implantology/Implant Dentistry ("the ABOI/ID"). (App. 2a; 26a-27a). Borgner and the AAID filed a complaint in the District Court for the Northern District of Florida challenging the constitutionality of the disclaimer provision set out in Section 466.0282(3), Florida Statutes (1999), which provision requires Florida-licensed dentists to include a modest disclaimer when advertising a credential or specialty practice that is approved by an accrediting organization other than the American Dental Association ("the ADA") or the Florida Board of Dentistry ("the Board"). (App. 1a-3a; 61a).[1] The amended statute includes as well, explicit findings of fact which establish the necessity for the disclaimer provision amendment and an express statement of legislative purpose. § 446.0282(4), Fla. Stat. (1999). (App. 61a).[2]

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1. The Board is the State's statutorily created licensing board, and it is responsible for enforcing the provisions of the Florida Statutes which regulate Florida's dental industry. § 466.004, Fla. Stat. (2001).

2. In its earlier version, Section 466.0282 completely prohibited Florida-licensed dentists from advertising specialty practices or credentials from any accrediting organization not recognized by the State (*i.e.*, either the Board or the ADA, as the State's designee), and Borgner successfully challenged the statute's constitutionality. *Borgner v. Cook*, 33 F. Supp. 2d 1327 (N.D. Fla. 1998). (App. 2a; 46a-58a).

The district court granted summary judgment in favor of Borgner and the AAID, and declared the statute unconstitutional "to the extent it prohibits Dr. Borgner from advertising membership in the AAID and his credentialed status in the AAID and ABOI/ID" and "to the extent that it prohibits Dr. Borgner from either representing to the public that his practice is limited to implant dentistry or announcing a practice emphasis in implant dentistry without also incorporating a disclosure statement." (App. 45a).

The Eleventh Circuit reversed the summary judgment and declared the statute constitutional (App. 18a), emphasizing at the outset that the statute "clearly permits advertisement . . . so long as these statements are accompanied by the appropriate disclaimers." (App. 7a).

The court applied the "four-step process for assessing the constitutionality of a restriction on commercial speech" (App. 7a), announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), recognizing that: (i) there is a distinction drawn between "potentially" and "inherently" misleading advertising (App. 8a); (ii) "Florida's desire to regulate dentists' advertisements" and its interest in " 'protecting its citizens from unqualified and incompetent health care professionals' is certainly valid" (App. 8a-9a); (iii) Florida "is justified in regulating commercial speech in this area in such a way that information (*i.e.*, disclaimers in advertisements) is quickly available to consumers so that they might be able to make an informed decision in selecting a dental professional" (App. 13a); and (iv) the disclaimer provision in Section 466.0282, particularly when compared to the previous outright prohibition on advertising, is no more extensive than necessary to serve Florida's interest in "protecting its citizens

from unqualified and incompetent health care professionals, and establishing standards and uniform criteria for the certification of its licensed dentists." (App. 14a).

The court observed, consistent with this Court's precedent, that:

> Disclaimers are significantly different than outright bans on commercial speech; they are not as broad and less likely to be disproportionate to the ends the government seeks. Courts have been more tolerant of regulations mandating disclosure requirements than they have been of regulations that impose a total ban on commercial speech.

Id. (citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110-11 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1241 (E.D. Cal. 2000)).[3]

The court accordingly held that, "based on the record in this case . . . and Supreme Court and our circuit precedent recommending disclaimers as an alternative to outright prohibitions on commercial speech," the disclaimer

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3. The court rejected Borgner's reliance on *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136 (1994), because in that case, unlike here, there was no evidence of a harm that is "potentially real" and because the disclaimer provision in that case required not only a statement that the recognizing agency is not affiliated with or sanctioned by the state or federal government, but also a recitation of the agency's requirements for recognition. (App. 16a-17a).

requirements in Section 466.0282 are "not . . . especially long or burdensome, but simply an effective manner to convey necessary information to the public." (App. 17a).

REASONS FOR DENYING THE PETITION

I. The Standard Governing Disclaimers Is Well-Established.

In *Central Hudson*, the Court adopted a four-part analysis for determining the constitutionality of restrictions imposed on commercial speech, as follows: (i) whether "the communication is neither misleading nor related to unlawful activity," so that it is subject to First Amendment protection in the first instance; (ii) whether there is a "substantial interest to be achieved"; (iii) whether the regulation "directly advance[s] the [governmental] interest involved"; and (iv) whether the governmental interest "could be served as well by a more limited restriction." 447 U.S. at 564.

Significantly, in its final analysis, the Court suggested in *Central Hudson* that requiring additional information and disclosure in advertising, rather than speech suppression, is the preferred regulatory technique. *Id.* at 570-71.[4]

4. Even earlier, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court expressed its preference for disclaimers over outright prohibitions on potentially misleading commercial speech, observing that, because commercial speech is "the *Sine qua non* of commercial profits, there is little likelihood of it being chilled by proper regulation." *Id.* at 772 n.24. *Accord Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (recognizing that it is a "clearly permissible limitation[] on advertising" to require "some limited supplementation, by way of warning or disclaimer or the like, . . . to assure that the consumer is not misled").

In *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), the Court redefined part four of the *Central Hudson* test when it expressly rejected the least-restrictive-means test in favor of a considerably more liberal one, announcing:

> What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends, — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.

Id. at 480 (internal quotations and citations omitted).[5] *Accord Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) ("In *Fox*, we made clear that the 'least restrictive means' test has no role in the commercial speech context."); *Zauderer*, 471 U.S. at 651 n.14 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized.").

5. The Court in *Fox* furthermore stated that it was best to "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

In virtually every case since *Central Hudson*, in which the Court has invalidated prohibitions on professional advertising, the Court has made a point of noting that the requirement of a disclaimer is a preferable alternative when the objective is to avoid potential confusion, because it promotes greater disclosure of information. *E.g.*, *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994) (striking a disclaimer provision due to a lack of evidence suggesting any harm that is "potentially real" and a finding that the disclaimer is overly burdensome, but stating that the Court "express[es] no opinion whether, in other situations or on a different record, the . . . insistence on a disclaimer might serve as an appropriately tailored check against deception or confusion"); *Peel*, 496 U.S. at 110 ("To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organizations or the standards of a specialty."); *Zauderer*, 471 U.S. at 651 ("[I]n virtually all our commercial speech decisions . . . we have emphasized that . . . warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusions or deception."); *In re R.M.J.*, 455 U.S. 191, 201 (1982) ("[T]he preferred remedy is more disclosure, rather than less.").

In *In re R.M.J.*, in an unanimous decision, the Court reviewed state disciplinary rules regulating attorney advertising and in its holding that potentially misleading advertising deserves some First Amendment protection appears to have redefined the scope of that protection, at least in the professional advertising context, as follows:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment.

> But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but *preferably a requirement of disclaimers or explanation*. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

455 U.S. at 203 (citation omitted; emphasis added).

In *Zauderer*, the Court reviewed a provision requiring that attorneys who advertise their availability to represent plaintiffs on a contingency basis must disclose that clients will have to pay costs even if their lawsuits are unsuccessful. 471 U.S. at 650. Zauderer's advertisement made no mention of this possible outcome and the Court observed that "to a layman" unaware of the distinction between legal fees and legal costs, the absence of a disclosure explaining such a distinction might suggest to the unsuspecting plaintiffs that hiring the attorney would be "a no-lose proposition." *Id.* at 652.

The Court thus upheld the disclaimer provision in *Zauderer*, stating:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.

Id. at 651 (citations omitted). The constitutional compromise that is struck by the resort to a disclaimer was not advanced lightly, however. The Court cautioned:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id.

The same rational appears to underpin the Court's decision in *Peel*. The Court there reviewed the public censure of an attorney who identified himself in his letterhead as a civil trial specialist certified by the National Board of Trial Advocacy, a private organization endorsed by several states, but not Illinois. 496 U.S. at 95-96. The Court recognized the

valid governmental interest in avoiding any potential that the attorney's representation might mislead consumers, but found such interest was insufficient to justify a categorical ban on the commercial speech. *Id.* at 110. The Court encouraged disclaimer requirements as a preferable resort:

> To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider . . . requiring a disclaimer about the certifying organization or the standards of a specialty.

Id.

Finally, and most recently, in *Ibanez*, the Court invalidated a provision which prohibited an attorney, who was also a certified public accountant ("CPA") and certified financial planner ("CFP"), from including such designations on her letterhead, business cards, and advertisements. 512 U.S. at 138-39. The Court applied the *Central Hudson* test, which it characterized as requiring a showing that "the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Id.* at 142. The Court thus invoked the "no more extensive than necessary" language instead of the "reasonable fit" gloss on part four, demonstrating its intent to subject commercial speech regulations to a more searching scrutiny under parts three and four of *Central Hudson*. *Id.*[6]

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6. Giving further precision to the applicable level of scrutiny, in *Florida Bar*, the Court held that:

> [B]ecause the standards and conduct of state-licensed [professionals] have traditionally been subject to

(Cont'd)

The Court invalidated both disclaimer requirements, noting that there was a lack of record evidence of a harm that is "potentially real" (*id.* at 146), which defeated the state's attempt to overcome the "constitutional presumption favoring disclosure over concealment" (*id.* at 145), and that the disclaimer requirements were overly burdensome. *Id.* at 146-47.[7] The Court clarified the applicable analysis by announcing that required disclosures and disclaimers must themselves meet *Central Hudson*, enhancing the mere "reasonableness" test approved by the majority opinion in *Zauderer*. *Id.* at 142-43, 146.

II. Petitioners Present No Case For Review.

Petitioners essentially advance two grounds upon which they suggest that the Court should grant certiorari review: (i) there is a need for greater clarity and precision regarding the constitutional analysis applicable to disclaimer

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> extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the subordinate position of commercial speech in the scale of First Amendment values.

515 U.S. at 635 (internal quotations omitted).

7. Justice O'Connor, joined by Chief Justice Rehnquist, considered Ibanez's use of "CFP" both inherently and potentially misleading, and thus dissented from the Court's opinion concerning use of the "CFP" designation. *Id.* at 149. Justice O'Connor would have held that the state, although unable to ban the use of "CFP" completely, might at least require disclosure about the certifying organization and its standards, and a statement disclaiming affiliation with the state. *Id.* at 152-53.

requirements versus speech prohibitions; and (ii) there is a purported "trend" afoot toward the application of an "exceedingly relaxed scrutiny to commercial-speech disclaimers" such that it has become a regulation of first resort rather than last resort. (Petition at 11). Neither ground supports a case for review.

Petitioners fail to give due recognition to the many decisions of this Court since *Central Hudson*, as set out above, which provide an unequivocal framework for analyzing the constitutionality of disclaimer provisions. Discounting the jurisprudence developed on this issue, Petitioners contend that the Court has not established a standard for assessing the constitutionality of disclaimers, that there has been no statement of the findings necessary to support a disclaimer, and that there is no precise standard for the means-end analysis. Respectfully, this contention reflects more on Petitioners' dissatisfaction with the state of the law then on a purported need for a clearer statement of the applicable constitutional analysis. It is readily seen that Petitioners actually are seeking to undo the well-established jurisprudence pertaining to the regulation of commercial speech which has encouraged the disclaimers as the preferred resort.

The suggestion by Petitioners that the Eleventh Circuit's decision marks a "trend" toward the application of an "exceedingly relaxed scrutiny to commercial-speech disclaimers" drawn from the "bookend" propositions that disclaimers are preferable to outright bans and that they prevent advertising from being potentially misleading (Petition at 11-12), is unfounded. Simply, no such trend is apparent.

Petitioners offer a laundry list of cases in which federal and state courts have upheld disclaimer requirements. (Petition at 23-24). This listing of cases provides no meaningful consideration of the underlying analysis supporting the result obtained in each instance, however. That disclaimers were upheld in each case simply does not demonstrate a departure from the constitutional analysis established by this Court, as set out above, nor does it demonstrate any purported trend.

Recent Eleventh Circuit cases illustrate that, far from Petitioners' suggestion, the First Amendment has been carefully guarded to the point of unduly restricting disclaimer provisions in some instances.

In *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the Eleventh Circuit struck a disclaimer requirement imposed by the Florida Bar. Mason included in his advertisements the representation that he is " 'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory." *Id.* at 954. The Bar required that an advertisement containing the representation also include a disclaimer stating that Martindale-Hubbell ratings are based upon confidential information and that not all lawyers are rated. *Id.* Citing many of this Court's major decisions on professional advertising, the court held that requiring such a disclaimer would be an unconstitutional restriction on Mason's freedom of commercial speech. *Id.* at 955, 958. The court was notably persuaded that the Bar had "presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public." *Id.* at 957.

It is arguable that the Eleventh Circuit in *Mason* went beyond the lines drawn by this Court. In *Zauderer*, the Court noted that it is not necessary for a state to conduct a survey when the possibility of misleading the public is self-evident.[8] It is not unreasonable to conclude that an unsophisticated member of the public reading the phrase "highest rating" could conclude that all attorneys are rated and that the ratings are based on objective, verifiable criteria. Contrary to the Petitioners' assertion regarding the purported "trend," the Eleventh Circuit's decision in *Mason* is, if anything, an unduly *restrictive* application of the principles set forth by this Court.

In *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992), the Eleventh Circuit struck a statutory provision prohibiting an unlicensed individual from advertising as a "psychologist." The court held that Florida could not impose such a restriction on commercial speech because Florida law does not require a

8. In *Zauderer*, emphasizing the "material differences between disclosure requirements and outright prohibitions on speech," 471 U.S. at 650, the Court concluded that, "[w]hen the possibility of deception is self-evident . . . , we need not require the State to conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead." *Id.* at 652-53 (internal quotations and citations omitted). To the same effect is *Florida Bar*, in which the court explained:

> [W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales . . . or . . . based solely on history, consensus, and "simple common sense."

515 U.S. at 628 (citations omitted).

license to practice psychology. *Id.* at 1578. Adhering precisely to this Court's precedent, the court then suggested that resort to a disclaimer would be a constitutional alternative; it would be minimally restrictive while sufficient to cure the potential deception and ultimately serving the State's interest. The Eleventh Circuit stated in support:

> Admittedly, some danger exists that the public will be misled if the plaintiffs are permitted to hold themselves out as psychologists. Yet, when the first amendment is at issue, the preferred remedy is more disclosure, rather than less. *Peel* and earlier cases have described various regulatory safeguards which the state may impose in place of the total ban on commercial speech now in effect.
>
> The first amendment dictates that commercial speech not false or inherently misleading may be regulated, but may not be banned. . . . To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information.

Id. at 1577 (internal quotations and citations omitted).

Certainly in this case, the Eleventh Circuit adhered to the well-established standard. The Florida Legislature created the Board of Dentistry by statute and delegated to it the authority to oversee and police Florida's dental industry and its licensed practitioners. § 466.004, Fla. Stat. (2001). *See, e.g., State ex rel. Greenberg v. State Bd. of Dentistry*, 297 So. 2d 628, 636 (Fla. 1st DCA), *cert dismissed*, 300 So. 2d 900 (Fla. 1974).[9] The Board, in particular, is statutorily authorized, based on the ADA's findings as well, to identify those specialty practice areas and credentialing organizations that meet the State's minimum standards for such recognition. § 466.0282, Fla. Stat. (2001). There is every reason to believe, therefore, that specialty status is sanctioned by the State, through the Board and the ADA as its designee. Advertisements without the disclaimer would self-evidently be misleading, and the surveys confirmed this.[10] Petitioners simply fail to appreciate the distinction

9. Florida has a substantial interest in restricting the commercial speech of its licensed health care professionals, in an effort to "protect[] its citizens from unqualified and incompetent health care professionals," and "has broad police powers to regulate for the health and safety of its citizens." *Strang v. Satz*, 884 F. Supp. 504, 508 (S.D. Fla. 1995). *See, e.g., Van Pelt v. Hilliard*, 78 So. 693, 697 (Fla. 1918) (holding that legislative discretion in classifying the subjects of police regulation will not be disturbed by the courts unless it is wholly without a reasonable basis). Indeed, this Court has recognized:

> States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

Florida Bar, 515 U.S. at 625 (citation omitted).

10. The Eleventh Circuit determined:

> [T]hrough the[] surveys [submitted to the district court], the state has demonstrated the actual harm that could come from Borgner's proposed advertisements that do not include disclaimers. Without a disclaimer, consumers are led into thinking implant dentistry is a state-

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between a credentialing organization that is "bona fide" and one which is authorized to designate a specialty practice. There must be some leeway so that the Board's authority is given some meaning.

The Eleventh Circuit's decision in this case was entirely rational, and reflects a consistent application of constitutional analysis enunciated by this Court. Florida has determined that it is in its citizens' best interest if the Board and the ADA are the officially designated and approved organizations responsible for determining the standards and criteria for specialty practice recognition and credentialing. A Florida-licensed dentist may publish a specialty practice or credential approved by another non-recognized accrediting organization, but the public must be informed of that qualifying fact. The State has a substantial interest in preserving the integrity of its professional dental practice and to establish standards and uniform criteria.

The constitutionality of a disclaimer ultimately must be measured by weighing the burden on the advertiser against the benefit to the public. The burden on Florida-licensed dentists resulting from the disclaimer provision in Section 466.0282 is insignificant on balance against the potentiality

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(Cont'd)

> recognized specialty and that AAID and ABOI/ID enjoy state approval, when in reality, they do not. The state has also shown that its disclaimer requirements will alleviate this harm because providing disclaimers will help consumers make better, more informed decisions about whom they select as their general or specialized dentist.

Borgner v. Brooks, 284 F.3d 1204, 1213 (11th Cir. 2002). (App. 13a).

that the public will be misled to believe that their choice in a dentist, based on advertised qualifications, is substantiated by the State's endorsement.[11] In the end, it is readily seen that Petitioners have overstated the import of what is nothing more then their dissatisfaction with the outcome of this particular case.

It is simply counterintuitive to suggest that a great many cases are resulting in decision upholding disclaimer requirements and that such a "trend" reflects the application of an "exceedingly relaxed scrutiny" which this Court should revisit. To the contrary, these decisions demonstrate that there is, across the board, no confusion regarding the applicable analysis for determining the constitutionality of commercial speech regulation, as developed by this Court. The issue presented by Petitioners does not warrant consideration.

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11. Petitioners contend that significance should be given to the fact that the disclaimer here at issue is a "scripted disclaimer." (Petition at 11, 18). The suggest is unfounded, and fails to appreciate that disclaimers by nature are scripted. Neither is there any basis for the Petitioners' contention that significance should be given to the fact that a business card will not accommodate the disclaimer. (Petition at 22). The size of the advertisement or its placement (*e.g.*, embossed on a pen) does not control the constitutional analysis.

CONCLUSION

Respondent, The Florida Board of Dentistry, respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BARRY RICHARD
Counsel of Record
GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32301
(850) 681-0207

ELLIOT B. KULA
GREENBERG TRAURIG, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500

Attorneys for Respondent
The Florida Board of Dentistry